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No. 94-336

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PLATO L. SMITH,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JOSEPH E. TAYLOR; JAMES M. THOMAS, JR.; LUTHER C. WILLIAMS; and LOCAL 689,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals correctly ruled that the District of Columbia Superior Court's expungement order was irrelevant to this case and whether the grant of summary judgment constituted a failure to give full faith and credit to the expungement order?

2. Whether the U.S. Court of Appeals correctly ruled that Defendants were entitled to summary judgment under Rule 56?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent Washington Metropolitan Area Transit Authority does not have a parent corporation, any affiliates or any subsidiaries. The Washington Metropolitan Area Transit Authority is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress through Pub. L. No. 89-774, to operate a regional transportation system in the Washington, D.C. metropolitan area.

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BRIEF IN OPPOSITION FOR RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent Washington Metropolitan Area Transit Authority ("WMATA") respectfully submits that this case does not present any issue appropriate for consideration by this Court and that the Petition For A Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

This case arises from WMATA's termination of its employee, Petitioner Plato Smith ("Smith"), because he sold marijuana on duty, as detailed below.

I. SMITH'S TERMINATION

On January 21, 1989, Smith was on duty as a station manager at the Federal Triangle Metrorail station kiosk. According to the report of WMATA's Transit Police Officer, Smith was observed engaging in the sale of marijuana to a patron from the kiosk. After Smith was arrested by the Transit Police Officer, additional marijuana was discovered in the kiosk. By letter dated January 26, 1989, Smith was informed that he was being terminated immediately because he was "in violation of the . . . [WMATA] rule regarding the sale or possession of drugs or alcohol."

Smith pled guilty to a drug-related charge and was sentenced to unsupervised probation[1] *after* he was terminated by WMATA. By letter dated September 11, 1989, Smith's attorney wrote to WMATA seeking Smith's reinstatement, advising WMATA "that upon completion of his probationary period his conviction . . . will be expunged." Smith was never reinstated.

At all times material to Smith's lawsuit, there existed a collective bargaining agreement between Amalgamated Transit Union Local 689 (of which Smith was a member) and WMATA governing the terms and conditions of employment of represented employees. It includes a

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[1] Thus, Smith was more than "a suspect in an encounter with the criminal justice system" as he asserts in his Petition for Certiorari.

grievance procedure and provides for compulsory, binding arbitration of all unresolved labor disputes. Smith did not file a grievance.

II. WMATA'S POLICY ON DRUGS IN THE WORKPLACE

On November 29, 1984, Local 689 and WMATA executed a Substance Abuse Policy/Employee Assistance Program (SAP/EAP). The SAP/EAP mandates termination of an employee engaged in the sale or possession of controlled substances regardless of whether he has been arrested or convicted of a crime. It is pursuant to this policy that Smith was terminated. Smith's assertion in his Petition at page 6 that he was terminated "*because of* his encounter with the criminal justice system" is simply wrong. (emphasis added). Smith was terminated because he engaged in activities prohibited by WMATA's substance abuse policy.

III. THE PROCEEDINGS BELOW

Smith filed his suit in the District of Columbia Superior Court in January, 1992 against WMATA and Local 689, as well as Joseph Taylor, the management official who had signed the letter dismissing him; Luther Williams, the then manager of Employment Services; and the president of Local 689, James M. Thomas, Jr. On February 18, 1992 WMATA removed the case to the United States District Court For The District Of Columbia.[2] Smith alleged civil rights violations, a conspiracy

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[2]Pursuant to the WMATA Compact, paragraph 81, the United States District Courts have original jurisdiction of all actions brought by or against WMATA, concurrent with the courts of Maryland and Virginia. All actions initiated in a State court are removable to the appropriate United States District Court.

between WMATA and Local 689, retaliatory discharge for having filed a workers' compensation claim, breach of contract, infliction of emotional distress and interference with prospective advantages.[3] On February 24, 1992, the union defendants moved to dismiss or for summary judgment. This motion was denied by the Court without prejudice on April 7, 1992. Smith, WMATA and Local 689 served interrogatories and requests for production of documents on each other, which discovery was answered. On May 26, 1992 Smith and the three named individual defendants were deposed.

On April 21, 1992, defendants Taylor and Williams moved to dismiss, based upon Section 80 of the WMATA Compact. On July 2, 1992, defendants Local 689 and Thomas filed a renewed motion to dismiss or in the alternative for summary judgment.

On July 7, 1992 Smith served a subpoena upon Isidore Gromfine, Esq., Local 689's counsel, who had corresponded with Smith's former attorney during 1990. Local 689 moved to quash the subpoena opposing it because it invaded attorney-client privilege and was unreasonably cumulative or redundant since copies of the correspondence signed by Mr. Gromfine had already been provided. Smith then moved to compel the appearance of Isidore Gromfine at a deposition or in the alternative to hold Gromfine in contempt. On the day the summary judgment motion was heard, this was the only pending discovery matter.[4]

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[3]Smith's Amended Complaint is appended hereto. On Appeal, Smith did not pursue the dismissal of the counts concerning breach of contract, infliction of emotional distress, and interference with prospective advantages.

[4]Thus, Smith's suggestion (Petition at 4) that summary judgment was granted prematurely because substantive relevant discovery was still pending is disingenuous.

In a hearing on July 15, 1992, the District Court granted the motion to dismiss Taylor and Williams, on the basis of Section 80 of the WMATA Compact; the motion to amend the complaint; and summary judgment to Local 689, Thomas, and WMATA. As the Court explained at the hearing, there was no material dispute of fact regarding the stated rationale for Smith's dismissal[5] and there was no evidence in the record of the existence of a conspiracy. Appendix to Petition For A Writ Of Certiorari ("Appx") at 18a. The Court also found that the assertions regarding a racial basis for the action were completely unsubstantiated. The Court stated, "I am not going to let you pursue this case further at considerable expense and considerable inconvenience to the defendants, based upon the evidence that I have got here, which suggests that there is no conspiracy whatsoever that your [sic] going to be able to prove, no matter how much discovery you take." Appx at 19a. Smith filed a timely appeal with the United States Court of Appeals for the District of Columbia Circuit. The Circuit Court, finding that oral argument was unnecessary, affirmed the judgment of the District Court. Smith's petition for rehearing and suggestion for rehearing *in banc* were denied.

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[5]Smith's characterization of this ruling (Petition at 9) as "arbitrary" is specious. The termination letter stating the reason for termination as the violation of the policy was before the Court. There was no *evidence* (other than Smith's "beliefs") of any other reason for the termination.

REASONS FOR DENYING THE WRIT

Petitioner's Writ should be denied because the court below correctly decided the issues; the issues do not involve any novel legal issues or conflict among the circuits warranting this Court's review; and only questions of the sufficiency of evidence are involved.

I.
THE COURTS BELOW CORRECTLY FOUND THAT THE EXPUNGEMENT ORDER WAS IRRELEVANT TO THIS CASE.

Smith argues that because his criminal record was expunged by the District of Columbia Superior Court, the District Court's and Court of Appeals' failure to find that this expungement retroactively eliminated WMATA's grounds for terminating Smith constituted a failure to give the constitutionally required full faith and credit to the expungement. This argument implicates no conflict among the circuits as to the full faith and credit to be given an expungement order, has no implication beyond the facts of this case, and is, very simply, wrong.

A. Full Faith And Credit Of The Expungement Order.

WMATA does not disagree that an order of a state court, including an expungement order of the District of Columbia Superior Court, is entitled to full faith and credit by federal courts. Thus, there is no need for this Court to determine this issue. The real issue here is specific to the facts of this case and, therefore, does not warrant review by this Court. The issue is whether, by not finding that WMATA's termination and refusal to reinstate Smith was unlawful, the lower courts failed to

give full faith and credit in this case. The District Court stated: "No, I am no (sic) refusing to give full faith and credit to an order of the Superior Court. An order of expungement does not operate to relieve him of the consequences of his criminal conduct insofar as his status as an employee of WMATA is concerned." Appx at 27a. The Court of Appeals stated that "Smith's full faith and credit challenge to the district judge's ruling has no relevance to the legal question whether Smith presented evidence of discrimination sufficient to withstand summary judgment." Appx at 6a-7a.

WMATA did not rely upon the fact of an arrest or conviction in dismissing Smith. His employment was terminated because he engaged in conduct which violates the disciplinary rules of the SAP/EAP. The letter terminating Smith explicitly stated that "*setting aside the issue of an arrest and subsequent conviction*, . . . the negotiated . . . policy . . . provides that the use, sale or possession on duty of any intoxicant (drug or alcohol) is grounds for immediate termination. Based upon the Transit Police Officer's observations which are contained in his written reports of the incident, along with the confirming test of the bag's contents, it is my conclusion that you are in violation of the above referenced rule." (emphasis added). Therefore, the subsequent expungement of Smith's arrest record did not affect the circumstances which warranted his removal. Issuance of an expungement order in a criminal proceeding does not change history and does not require recision of Smith's termination nor does it require his reinstatement. In *Dickerson v. New Banner Institute*, 460 U.S. 103, 115 (1983), this Court noted that "expunction does not . . . signify that the defendant was innocent of the crime to which he pleaded guilty."

B. D.C. Code §33-541 Does Not Create a Private Right of Action.

Nothing in D.C. Code Ann. §33-541 suggests that it gives rise to a private right of action against a third party such as WMATA. This Court has cautioned against the creation of a new judicial remedy where a comprehensive statutory scheme, such as that created by Section 66 of the Compact, exists.[6] *Bush v. Lucas,* 462 U.S. 367, 398 (1983). The language of the statute does not suggest that it creates any obligations upon a third party, such as WMATA. The statute provides that a person may apply for an order to expunge from all official records "all recordation relating to his or her arrest, indictment or information, trial, finding of guilty and dismissal and discharge pursuant to this subsection." WMATA's records do not constitute official records as contemplated by this statute, as these records are not available to the public at large. Nor would an expungement order undermine the basis for Smith's dismissal, which was the fact that he engaged in conduct violative of a disciplinary rule. As the District Court stated, "[a]n order of expungment simply deals with [Smith's] criminal liability. It does not relieve him of his responsibility to have conformed to the rules of his employer." Appx at 16a. Thus, there is no basis for alleging that WMATA has "violated" the expungement order.

Expungement restores a person to his status before his arrest and conviction, not to his status before the act committed which resulted in his arrest and conviction.

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[6]The WMATA Compact provides for collective bargaining on virtually any issue arising between labor and management. The Compact mandates compulsory, final and binding arbitration of all labor disputes. *See* §66(c) of the Compact, D.C. Code §1-2431.

Thus, if one goes back in time to the moment before Smith's arrest and conviction, the fact remains that a Transit Police Officer found him engaging in an act which violated WMATA's substance abuse policy and which provided grounds upon which WMATA could lawfully terminate his employment. Whether Smith was or was not arrested and convicted is simply irrelevant. There is no issue concerning full faith and credit for this Court to decide and there is no issue concerning D.C. Code §33-541 which merits this Court's review.

II.
SMITH WAS NOT IMPROPERLY DENIED HIS RIGHT TO A JURY TRIAL.

A. The Circuit Court's Affirmance Was Proper.

Smith argues that the entry of summary judgment denied him his right to a jury trial. Petitioner Smith argues that the Circuit Court not only failed to review the District Court's decision *de novo,* but that it denied (presumably improperly) Smith the opportunity to present oral argument in support of his case. Petition at 16, 28-31. The Circuit Court clearly did review the decision *de novo.* The Court states in its Judgment: "Our review of the record and of Smith's briefs reveals no evidence that suffices to raise such an issue of material fact." Appx at 6a. Accordingly, the issue of what the appropriate standard of review is for an appellate court reviewing the grant of summary judgment is not before this Court.

The Circuit Court's decision to forego oral argument does not warrant this Court's review. Circuit Rule 34 of the rules of the D.C. Circuit (formerly Rule 13(i)) permits the court, by unanimous decision of a three-judge panel, to dispense with oral argument if it decides oral

argument is not necessary. Argument may be waived if: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoratively decided; or (C) the facts and legal arguments are adequately presented in the briefs, pleadings, and record, and oral argument would not significantly aid the Court. Former Rule 13(i)(3) permits one to move for reconsideration of a decision to dispense with oral argument. Smith did not move to reconsider. This Court ought not be burdened with reviewing an appellate court's completely discretionary decision under its local rules to forego oral argument.

B. Smith Was Not Unconstitutionally Deprived of His Right To A Jury Trial.

A plaintiff in a civil case does not have an absolute right to see his case go to trial and to have the opportunity to testify. The very existence of Federal Rule of Civil Procedure 56 belies this notion. The purpose of Rule 56(b) is to protect defendants from frivolous and vexatious lawsuits and to eliminate them from the court's docket. *See, e.g., Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990) ("purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other party's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues"); *Matsushita v. Zenith Radio,* 475 U.S. 574 (1986) (purpose of summary judgment is to see whether there is a genuine need for trial). The District Court's grant of summary judgment was proper and well within the bounds of this Court's pronouncements as to when summary judgment may be granted; no further review is required.

Smith states that "the District Court, sitting without a jury, before the completion of discovery and in disregard of Smith's 56(f) Affidavit, unfairly and erroneously decided a factual dispute based on a mistaken view of the evidence presented by Smith." Petition at 28. Smith is wrong on each of these points. First, except for Smith's taking the deposition of the Union's lawyer, Mr. Gromfine, discovery *was* complete. The non-taking of Mr. Gromfine's deposition was inconsequential. The documents that Smith requested Gromfine bring to his deposition had already been produced and the matters on which Smith sought to depose Gromfine were privileged attorney-client communications. Moreover, there was no proffer by Smith that deposing Mr. Gromfine would produce the evidence theretofore lacking which Smith needed to substantiate his claims. This was no more than a minor discovery dispute, clearly undeserving of this Court's attention.

Second, Smith's Rule 56(f) affidavit was insufficient to defeat summary judgment. The proper use of a Rule 56(f) Affidavit is well-settled; there is no circuit conflict on this issue needing the Court's resolution. The purpose of Rule 56(f) is to allow the nonmoving party to postpone a ruling on summary judgment if he can demonstrate that the evidence and facts necessary to defeat summary judgment are not available to him. However, to avail oneself of the protection afforded by Rule 56(f), a party must "conclusively justify his inability to respond adequately or not at all to the movant's affidavits . . . ." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 294 (8th Cir. 1975). The opposing party "must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired infor-

mation pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures." *Id.* (quoting 6 J. Moore, *Federal Practice* ¶ 56.24 at 2876 (2d ed. 1974)). Smith did not meet this burden. His rule 56(f) affidavit is replete with conclusory beliefs as to how he believes he was harmed by Defendants[7] and devoid of any concrete facts concerning what additional discovery he wished to take, what information he would gain from further discovery and what his attempts had been to obtain the information. Smith deposed the crucial participants and engaged in written discovery. There is nothing in his affidavit to suggest that there was anything else to learn which he had not yet had the opportunity to discover. *See Ezpeleta v. Sisters of Mercy Health Corp.*, 621 F. Supp. 1262, 1276 (D.C. Ind. 1985) ("[w]hen a party fails to secure discoverable evidence due to his own lack of due diligence, it is not an abuse of discretion for the trial court to refuse to grant a continuance to obtain such information").

Third, the District Court did not *resolve* a factual dispute. Rather, the court, viewing all the evidence before it, determined that there was no factual dispute. The standards for granting and denying summary judgment are well-established by this Court's renowned trilogy and Smith has articulated no reason for this Court to

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[7] *See e.g.* paragraphs 15 and 18 of Smith's first Rule 56(f) affidavit:

> 15. I *believe* that all of the Defendants conspired to terminate my employment because of my race and my protected activity. (emphasis added)
>
> 18. I *believe* that if given a full and fair opportunity to complete discovery, I will be able to present adequate support by affidavit for my opposition to this motion . . . . (emphasis added)

second guess those standards. *Anderson v. Liberty Lobby, Celotex Corp. v. Catrett,* and *Matshshita v. Zenith Radio* address the issue of the non-movant's burden in demonstrating the existence of *evidence* that there is a *sufficient* disagreement of *material* fact to warrant submission to the jury. Smith does not challenge these standards and, thus, there is no question raised by his Petition which this Court need examine.

It is well-settled that a plaintiff cannot survive a motion for summary judgment in the face of dispositive affidavits, without an averment estabishing some dispute of fact. There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986). The proper inquiry to determine whether to grant summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251.

Significantly, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[8] *Id.* at 247. Only disputes over facts that affect the out-

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[8]Smith's contention that a material dispute exists as to whether he sold marijuana is a red herring. Even if the denial by Smith three years after the incident is sufficient to create a dispute, the dispute is not material. The fact remains that WMATA fired and refused to reinstate Smith because WMATA had grounds, at the time, to believe Smith violated the SAP/EAP. There is no evidence that this reason was pretextual. Smith's attorney, in his September 11, 1989 letter seeking reinstatement for Smith, did not proffer as a basis for Smith's reinstatement that Smith denied having engaged in the conduct; the only basis for reinstatement was the anticipated expungement.

come of the suit will properly preclude the entry of summary judgment. *Id.* at 248. The nonmovant must present affirmative evidence, not mere denials, in order to defeat a properly supported motion for summary judgment. *Id.* at 257. Essentially, when the movant has met its burden under Rule 56, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zanith Radio,* 475 U.S. 574, 586 (1986); *accord Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

Smith did no more than rely on the conclusory allegations of his Amended Complaint. As the District Court stated, "the allegations and the assertions as to allegations are so couched as to create the illusion of an issue of fact when, in fact, there is no issue of fact here." Appx at 24a. There was no evidence whatsoever of conspiracy of any description anywhere based upon Smith's race or based upon the fact of his having filed an application for workers' compensation.

> There are only his unsubstantiated assertions of belief that for some reason he was treated as he was because of his race. It is not substantiated anywhere in this, record, . . . [T]he evidence that I have got here . . . suggests that there is no conspiracy whatsoever that your (sic) going to be able to prove, no matter how much discovery you take.

Appx 18a-19a. Both the Circuit Court and the District Court came to the same conclusions – Smith was terminated for selling drugs and no evidence existed to support any of Smith's claims.

C. Supreme Court Review Of The Propriety Of A Grant Of Summary Judgment Is Not Warranted.

This Court does not undertake to review concurrent findings of fact. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). This Court has previously denied petitions for Writs of Certiorari in cases with issues identical to those raised by Smith, and it is appropriate for the Court to deny Smith's petition as well. *See e.g., Chamness v. F.D.I.C., cert. denied,* 114 S.Ct. 2134 (1994) (No. 93-1573), *summarized,* 62 U.S.L.W. 3741 (may trial court or court of appeals grant or affirm motion for summary judgment *sua sponte,* or on grounds not pleaded in motion?) (May 10, 1994); *Lambert v. Genesee Hospital,* 10 F.3d 46 (2nd Cir. 1993), *cert. denied,* 114 S.Ct. 1612 (1994) (No. 93-1388), *summarized,* 62 U.S.L.W. 3676 (April 12, 1994) (should Court reverse summary judgment dismissal of some of petitioner's employment discrimination claims because court below invaded jury's function of weighing evidence offered, judging credibility, and determining motive?); *Kregos v. Assoc'd Press,* 3 F.3d 656 (2nd Cir. 1993), *cert. denied,* 114 S.Ct. 1056 (1994) (No. 93-863), *summarized,* 62 U.S.L.W. 3476 (Jan. 18, 1994) (did granting summary judgment against petitioner deprive petitioner of his seventh amendment right to a jury trial and did court improperly usurp function of trier of fact by resolving disputed issues of material fact against petitioner and basing conclusions on erroneous facts and unresolved factual issues?); *Rytman v. Kofkoff Egg Farm, cert. denied,* 114 S.Ct. 695 (1994) (No. 93-766), *summarized,* 62 U.S.L.W. 3425 (Dec. 21, 1993) (can federal court acton motion for summary judgment when discovery is outstanding and non-movant has requested oppor-

tunity to conduct discovery before motion is heard?); *Westfall v. Southwest Airlines, cert. denied,* 114 S.Ct. 553 (1993) (No. 93-573), *summarized,* 62 U.S.L.W. 3339 (Nov. 9, 1993) (when ruling on motion for summary judgment, can district court define as facts things that never occurred and are not in record, and can court declare that contradictory affidavits are really in harmony and then decide case on such finding?); *Harris v. American Medical Inc., cert. denied,* 114 S.Ct. 1642 (1994) (No. 92-1721), *summarized,* 62 U.S.L.W. 3036 (July 20, 1993) (has court of appeals sanctioned district court's departure from accepted judicial proceedings so as to call for exercise of Supreme Court's power of supervision, where district court, *inter alia,* granted summary judgment before Plaintiff had completed discovery?)

III.
THERE WERE SUFFICIENT OTHER REASONS SUBSTANTIATING THE COURT'S DISMISSAL OF THE COMPLAINT.

A number of additional bases existed on which the courts below could properly have ruled in WMATA's favor. These arguments support the judgment in WMATA's favor, without regard to the issues raised by Smith's Petition. As a result, this Court would not be likely to reach Smith's arguments if his Petition were granted.

A. The Suit Against WMATA Was Untimely Filed.

The District Court correctly ruled that Smith's suit was untimely. Smith alleged that WMATA wrongfully terminated him and that the Union failed to protest his discharge from employment. Smith was discharged in

January 1989 but he did not file his action until January 24, 1992, three years later. Hybrid wrongful discharge/duty of fair representation suits must be brought within six months of the date of termination. The District Court granted judgment on the basis that the six month limitations had expired. Once Local 689 was dismissed on that basis, WMATA was also properly dismissed, because "the two claims are inextricably interdependent. 'To prevail against either the company or the union, [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.' " [citation omitted] *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 164-65 (1983). In *Del Costello,* this Court held that the appropriate limitations period for filing a complaint against the employer is the six month limitation contained in the National Labor Relations Act. *Id.* at 154-55. The majority explicitly rejected establishing different limitations for the employer as opposed to the union. *Id.* at 170, n.19. The instant case is a hybrid suit because it implicates both the Union's duty to represent Smith as well as WMATA's alleged wrongful termination of Smith in breach of his rights.[9] Therefore, applying the six-month statute of limitations to the claims against WMATA as well as Local 689 was appropriate.[10] The facts of this case do not necessitate review

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[9]Section 104(d) of the collective bargaining agreement prohibits discharge except for sufficient cause.

[10]Smith states his suit was not one for breach of fair representation, but the allegations make clear that is precisely the basis of his claim. In *Buscemi v. McDonnell Douglas Corp.,* 736 F.2d 1348, 1351 (9th Cir. 1984), an employee filed suit seeking relief on state law claims of retaliatory discharge, wrongful termin-

[footnote continued]

of the tenets of *Del Costello.*

B. The Failure To Exhaust The Grievance/Arbitration Procedure Required Dismissal Of All The Causes Of Action.

Smith never filed a grievance concerning his discharge or his reinstatement. This failure to exhaust the contractual grievance and arbitration procedures precludes all of the causes of action of Smith's lawsuit. Under §66 of the WMATA Compact, an individual employee wishing to challenge employment decisions must attempt to use the arbitration procedures before seeking a remedy in court. *See Sanders v. WMATA,* 819 F.2d 1151, 1158 (D.C. Cir. 1987); *Hawthorne v. WMATA,* 702 F. Supp. 285 (D.D.C. 1988) (requiring WMATA employees to exhaust the grievance procedure before federal and state claims can be considered.) In *Sanders,* plaintiffs brought an action based upon the United States Constitution and 42 U.S.C. §1983. The claims filed by plaintiffs who had not exhausted the grievance procedure were dismissed. Under *Sanders,* WMATA was properly granted judgment in its favor on all of Smith's counts.

It is well established that Congress, in enacting a particular statute with its own remedial scheme, can foreclose litigation of related claims, including Section 1983 claims, in federal court. *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S. 1 (1981).

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ation of employment, and intentional infliction of emotional distress. Plaintiff insisted that he filed his action under state tort and contract law and not under §301 of the Taft-Hartley Act. The Court held that the complaint was time barred under *Del Costello.* Likewise, *Del Costello* clearly controls the outcome in the instant case.

The language of §66 of the Compact indicates a Congressional intent to make the arbitration procedure as comprehensive as possible and there is no indication that Congress intended that represented employees could choose to avoid this procedure.

This Court has repeatedly held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane,* 500 U.S. 20, 26 (1991). The Court declared that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* In *Hirras v. National Passenger Rail Corp.*, 10 F.3d 1142, 1146 (5th Cir. 1994), decided under the Railway Labor Act,[11] the court held that claims of racial discrimination arising under Title VII can be subject to the mandatory provisions of a grievance procedure. The presumption in favor of arbitration is particularly strong in the instant case, where Congress, in enacting the Compact under both its power to enact legislation for the District of Columbia and to create interstate compacts, required the use of labor arbitration.

This Court has recognized the problem of drugs in the workplace and the importance of an employer being able to control that problem. *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). WMATA's drug policy is not racist or discriminatory; it simply seeks to prevent WMATA employees from engaging in the use

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[11] Claims involving employees covered by the Railway Labor Act (RLA) are particularly germane since the RLA, like the WMATA Compact, requires arbitration of labor disputes. *See* 45 U.S.C. §153 First (h). The National Labor Relations Act does not require arbitration.

and sale of drugs on duty. If an employee feels he has been wrongfully terminated, he should avail himself of the grievance and arbitration policies and procedures which are in force.

C. Smith Does Not Have Any Cause Of Action Under Any Of The Reconstruction Era Civil Rights Acts.

Smith alleged violations of 42 U.S.C. §§1981, 1983 and 1985. Smith may not proceed under any of these three reconstruction era civil rights statutes. Section 1981 did not cover the conduct which forms the basis of this suit at the time the events occurred; the exclusive remedy for his claims are under Title VII; he cannot establish a §1983 claim; and his claims regarding retaliation for seeking workers' compensation are not redressable under §1985.

1. Smith's claims are not covered by Section 1981.

Section 1981 guarantees that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white persons. However, Section 1981 does not provide a damage remedy against a public entity. *Jett v. Dallas Independent School District,* 491 U.S. 701, 733 (1989). Thus, Section 1981 is clearly inapplicable to WMATA. Moreover, in 1989, when Smith was terminated and allegedly granted an expungement order, §1981 did not cover any issues relating to termination of an employment contract or to reemployment under an existing contract. Only the initial hiring or a promotion to a position governed by a completely different set of terms of employment (i.e., promotion to a supervisor) was

covered, under *Patterson v. McClean Credit Union*, 491 U.S. 164, 183 (1989).

After *Patterson*, several courts explicitly held that §1981 did not apply to contract termination. *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *vacated and remanded* 112 S.Ct. 960 (1992), *reaff'd* 975 F.2d 886, 899-900 (D.C. Cir. 1992), *cert. denied*, 128 L.Ed.2d 363 (1994). *Accord, Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990) (§1981 does not apply to discriminatory discharge). Although *Patterson* has been supplanted by the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, substantive changes to Section 1981 do not apply retroactively to conduct arising before passage of the Act. *Rivers v. Roadway Express Inc.*, 114 S.Ct. 1510 (1994).

2. Smith's claims are not covered by Section 1983.

To establish a claim under §1983, Smith was required to demonstrate that WMATA violated his federally protected rights. The crux of Smith's claim, set forth in his amended Complaint, is that WMATA and Local 689 have a policy of denying African-American males in the District of Columbia an equal opportunity to remain gainfully employed when they have asserted a right to workers' compensation benefits or have had an encounter with the "criminal justice system," and that African-American males are summarily punished with immediate termination without due process. First, the rights Smith asserts under the workers' compensation and expungement laws are *State*-created rights. Because they are not created under the Constitution or federal statute, they are not protected by §1983. *Baker v. McCollan*, 443 U.S. 137 (1979). Second, to the extent Smith alleges a violation of his due process rights, Smith's

claim fails because WMATA has in place a detailed grievance/arbitration procedure of which Smith should have availed himself. *Costello v. Town of Fairfield,* 811 F.2d 782 (2nd Cir. 1987) (no § 1983 claim where there was an adequate post-deprivation remedy through collective bargaining grievance procedure.) Finally, the officers and membership of Local 689 is overwhelmingly comprised of African-American males. It is ludicrous to believe that they harbor a racial animus toward Smith.

3. Smith's claims are not covered by Section 1985.

Smith's action also cannot be maintained under §1985 because: (1) he has not pled the minimum elements of a claim under Section 1985; (2) his exclusive remedy for his claims of discrimination is under Title VII; and (3) claims regarding his application for workers' compensation are not redressable under §1985.

(a) Smith has failed to allege a prima facie case of conspiracy.

Smith's §1985 claims fail because he has not alleged sufficient facts, which if accepted as true, would establish a prima facie case of conspiracy. To state a cause of action for conspiracy, the complaint must allege an agreement to deprive plaintiff of his civil rights predicated on a class based discriminatory animus and must further allege an act in furtherance of the conspiracy. *Bray v. Alexandra Clinic,* 113 S.Ct. 753 (1993). The allegations of a conspiracy under §1985 must be specific and not contain mere conclusory allegations of a conspiracy. *See Robinson v. McCorkle,* 462 F.2d 111, 113 (3rd Cir.), *cert. denied,* 409 U.S. 1042 (1972).

The conspiracy claims were subject to dismissal because Smith did not allege a specific concrete act on the part of anyone to further the alleged conspiracy. Smith does not allege a date when the conspiracy was allegedly formed. Nor has he alleged an agreement between two or more persons to deprive him of a constitutionally protected right. The complaint is fatally defective, as an alleged intra-corporate conspiracy involving WMATA employees is not actionable under §1985(3). *See Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1371 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989) (court dismissed §1985 claim that Police Commissioner conspired with the police department); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) ("if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute").

(b) Section 1985 may not be used to redress violations of Title VII.

Smith's claims under §1985 also fail since Title VII is his exclusive remedy for his claims of race discrimination. In *Great American Federal Savings and Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979), this Court held that "deprivation of a right created by Title VII cannot be the basis for a cause of action under §1985(c)." The Court reached this conclusion because §1985(c) provides no substantive rights. Section 1985 merely provides a remedy for the violation of existing rights. As such, the Court reasoned, a plaintiff should not be permitted to circumvent the administrative and remedial requirements of Title VII by asserting a claim through §1985.

(c) Section 1985 does not cover claims that WMATA retaliated against Smith because he obtained workers' compensation.

Smith alleged in his Amended Complaint that "Defendants took retaliatory actions against Plaintiff in an effort to defeat Plaintiff's right to receive worker's compensation benefits." The entire Amended Complaint (particularly Counts I, II, IV, V and IX) is based upon a claim that Smith suffered worse treatment because he successfully applied for workers' compensation (¶¶30, 32, 41, 45 and 64). On their face, these claims must fail. Employees who have suffered discrimination at the worksite in retaliation for claiming workers' compensation are not protected by §1985.

To state a cause of action under §1985, the defendant's behavior must be motivated by a discriminatory class-based animus. In *United Board of Carpenters v. Scott,* 463 U.S. 825 (1983), the Court held that there exists "no convincing support in the legislative history for the proposition that [§1985(3)] was intended to reach conspiracies motivated by bias toward others on account of their economic views, status or activities." *Id.* at 837. The Court concluded that group actions generally resting on economic motivations should be deemed beyond the reach of §1985(3). *Id.* at 839. Such economic motivation is at the heart of Smith's contentions regarding workers' compensation and therefore all those claims must be dismissed.

CONCLUSION

For the foregoing reasons, Respondent Washington Metropolitan Area Transit Authority respectfully requests this Court to deny Plato Smith's Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
Civil Division

No. C.A. No. 92-419 (TPJ)

PLATO L. SMITH
2530 Naylor Road, S.E. #102
Washington, D.C. 20020

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

and

JOSEPH E. TAYLOR, individually and in his
official capacity as Superintendent,
Rail Transportation (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

and

JAMES M. THOMAS, JR., individually and in his
official capacity as President-Business Agent,
AMALGAMATED TRANSIT UNION
National Capital Local Union 689
2001 9th Street, N.W., Suite 300
Washington, D.C. 20001

and

LUTHER C. WILLIAMS, individually and in his official capacity as Manager, Direct Personnel Support Office of Personnel and Training (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

Defendants.

AMENDED COMPLAINT

(CIVIL RIGHTS, CONSPIRACY, RETALIATORY DISCHARGE, BREACH OF CONTRACT, INFLICTION OF EMOTIONAL DISTRESS & INTERFERENCE WITH PROSPECTIVE ADVANTAGES)

1. The jurisdiction of this court is invoked pursuant to D.C. Code Sections, 11-921. Plaintiff also is proceeding under 42 U.S.C. 1981 and 42 U.S.C. 1985(3).

2. Plaintiff Plato Smith started his employment with the Washington Metropolitan Area Transit Authority (WMATA) on June 1, 1970.

3. Plaintiff continued his employment with WMATA until he was terminated on January 26, 1989.

DEFENDANTS

4. Defendant Washington Metropolitan Area Transit Authority is a body corporate that was created to, among other things, plan, develop, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning as part of a balanced regional system of transportation. WMATA has been given the powers and duties to sue and be sued.

5. At all times relevant hereto, Defendant Joseph E. Taylor was employed with WMATA as Superintentent Rail Transportation, WMATA.

6. At all times relevant hereto, Defendant James M. Thomas, Jr., was President-Business Agent for the Amalgamated Transit Union, National Capital Local Union 689. Defendant Amalgamated Transit Union, Local 689, was the collective bargaining representative with WMATA for Plaintiff and other members of Local 689.

7. At all times relevant hereto, Defendant Luther C. Williams was employed with WMATA as Manager, Direct Personnel Support, Office of Personnel and Training, WMATA.

OPERATIVE FACTS

8. Plaintiff is an African American citizen of the United States of America and a resident of the District of Columbia.

9. In exchange for the payment of wages and equal employment opportunity, Plaintiff accepted the position of Bus Operator with Defendant WMATA in June 1, 1970.

10. Plaintiff was employed as a bus operator with WMATA until he injured his back at work when his seat collapsed on July 16, 1986.

11. Plaintiff sustained a work related herniated disc which caused him to be absent from work until August, 1988.

12. Plaintiff returned to light duty work as a rail station attendant on August 21, 1988.

13. Plaintiff's work related back injury left him unable to perform his duties as a bus operator.

14. Plaintiff was a member of the Amalgamated Transit Union, National Capital Local Union 689.

15. All of Plaintiff's performance evaluations were satisfactory or better.

16. Plaintiff applied for and received worker's compensation benefits as a result of his work-related injuries on July 16, 1986.

17. Defendants took retaliatory actions against Plaintiff in an effort to defeat Plaintiff's right to receive worker's compensation benefits and engaged in continuing torts and continuing acts of discrimination against Plaintiff because of his race and protected activities.

18. In January 1989, Plaintiff was a suspect in an encounter with the criminal justice system.

19. Although Plaintiff's encounter with the criminal justice system was concluded without any adjudication of guilt against Plaintiff nor any admission of guilt by Plaintiff, Defendants have used Plaintiff encounter with the criminal justice system as a pretext to terminate his long term employment with WMATA.

20. Defendant Joseph Taylor informed Plaintiff on January 26, 1989 that his employment with WMATA was terminated because of his encounter with the criminal justice system.

21. Defendant James M. Thomas, Jr., and Amalgamate Transit Union, Local Union 689, conspired with Defendants to terminate Plaintiff's employment with WMATA in violation of Plaintiff's contract with Local Union 689 and WMATA.

22. Defendant Luther C. Williams conspired with the other Defendants to terminate Plaintiff's employment with WMATA and to wrongfully prevent Plain-

tiff from being reinstated to his employment with Defendant WMATA.

23. Although Plaintiff was issued an Order of Expungement as a result of his encounter with the criminal justice system, Defendants have continued to retaliate against Plaintiff by refusing to permit him to be reinstated to his employment with WMATA and to obtain the benefits of his contract with WMATA and Local Union 689.

24. Plaintiff is still suffering from the work related injuries he sustained while a bus operator with WMATA.

25. Plaintiff desire to be reinstated to his employment with WMATA without regard to his race, work related injures, or encounter with the criminal justice system.

STATEMENT OF PLAINTIFF'S CLAIMS

Count I
(Civil Rights)

26. Plaintiff realleges and incorporates herein paragraphs 1-25 above as a part hereof.

27. Defendants have intentionally refused to reinstate Plaintiff to his position with Defendant WMATA because of his race.

28. Plaintiff has sought reinstatement of his employment with Defendant WMATA but has been rejected by Defendants.

29. As a direct result of Defendants' wrongful and illegal actions, Plaintiff has been denied his rights to equal employment opportunities and deprived of his employment because of his race.

30. Defendants James Thomas and Amalgamated Transit Union, Local 689, have refused to protect Plaintiff's

constitutional and contract rights in furtherance of their conspiracy with the other Defendants in order to deprive Plaintiff of his employment with WMATA because of his race and retaliation for having sustained work related injuries and sought worker's compensation benefits.

COUNT II
(Retaliatory Discharge)

31. Plaintiff realleges and incorporates herein paragraphs 1-30 above as a part hereof.

32. Defendants have engaged in the aforesaid acts of employment discrimination and retaliation against Plaintiff because Plaintiff was injured at work and has claimed worker's compensation benefits from Defendant WMATA.

33. As a direct result of Defendants' illegal actions, Plaintiff has been harmed and deprived of his employment with Defendant WMATA.

34. Plaintiff realleges and incorporates herein paragraphs 35-81 below as a part hereof.

COUNT III
(Intentional Infliction of Emotional Distress)

35. Plaintiff realleges and incorporates herein paragraphs 1-34 above as a part hereof.

36. Defendants' willful, intentional, outrageous and malicious conduct have been directed against Plaintiff in order to cause Plaintiff to suffer emotional and mental distress.

37. As a direct result of Defendants' wrongful conduct as set forth herein, Plaintiff has suffered and continue to suffer emotional distress.

38. Plaintiff realleges and incorporates herein paragraphs 39-81 below as a part hereof.

COUNT IV
(Interference with Prospective Advantages)

39. Plaintiff realleges and incorporates herein paragraphs 1-38 above as a part hereof.

40. Defendants have intentionally interfered with Plaintiff's rights to equal employment opportunity to continue his employment and advance to higher level positions with Defendant WMATA or to seek a normal retirement from WMATA.

41. Defendants continuing discrimination and the retaliation which Plaintiff is apparently experiencing in his wrongful denial of employment with Defendants have deprived Plaintiff of comparable pay and employment benefits which are enjoyed by the white employees at Defendant WMATA and those employees who have not claimed worker's compensation benefits. Plaintiff has been harmed as a direct result of Defendants' wrongful and tortious interference with Plaintiff's prospective advantages.

42. Plaintiff realleges and incorporates herein paragraphs 43-81 below as a part hereof.

COUNT V
(Conspiracy)

43. Plaintiff realleges and incorporates herein paragraphs 1-42 above as a part hereof.

44. Prior to and in 1989, the Defendants were engaged in a conspiracy to deny Plaintiff his rights to equal employment opportunity, including his rights to return

to his position and to advance and retire as an employee of Defendant WMATA.

45. In furtherance of said conspiracy, the Defendants made false and baseless accusations about Plaintiff and wrongfully misrepresented their employment policy in order to terminate Plaintiff and to deprive him of other employment opportunities which have been granted to similarly situated white employees and employees who have not sought worker's compensation benefits.

46. Such conduct on the part of the Defendants was malicious, willful, wanton, and in knowing, intentional, and reckless disregard of the rights of the Plaintiff and other black and injured employees at Defendant WMATA.

47. Defendants had knowledge of the wrongs complained of herein by Plaintiff and have failed to prevent or aid in preventing any wrongs to Plaintiff complained of herein.

48. As a result of such conduct on the part of the Defendants, the Plaintiff has suffered severe and serious injuries, as aforesaid.

49. Plaintiff realleges and incorporates herein paragraphs 50-81 below as a part hereof.

COUNT VI
(Breach of Contract)

50. Plaintiff realleges and incorporates herein paragraphs 1-49 above as a part hereof.

51. Defendants have consistently, knowingly and intentionally, breached the provision of Plaintiff's contract of employment by failing to and refusing to allow Plaintiff to return to his employment with WMATA.

52. As a direct result of Defendants' failure to honor the order of Expungement entered by this Court and the failure to grant the reinstatement of Plaintiff after his wrongful termination, Plaintiff has been denied a full and fair opportunity to continue his employment and occupy available positions with Defendant WMATA or to seek a normal retirement.

COUNT VII
(Expungement)

53. Plaintiff realleges and incorporates herein paragraphs 1-52 above as a part hereof.

54. Defendants have failed to honor the October 12, 1989 Order of Expungement issued by this Court expunging all records of Plaintiff's encounter with the criminal justice system on January 21, 1989.

55. Plaintiff seeks a declaratory judgment and injunction from this court requiring Defendants to honor this Court's October 12, 1989 Order of Expungement of Plaintiff's encounter with the criminal justice system.

COUNT VIII
(Constitutional Claims)

56. Defendants terminated Plaintiff for his encounter with the criminal justice system. Defendants asserted reason for terminating Plaintiff was not only false but malicious and asserted in wanton and deliberate indifference to Plaintiff's constitutionally protected rights to his good name, reputation, honor and integrity and in deliberate indifference to Plaintiff's constitutionally protected freedom to take advantage of other employment opportunities.

57. The manner in which Plaintiff was terminated from his employment deprived Plaintiff of both his liberty interests to his good name and reputation and his freedom to take advantage of other employment opportunities for which he is qualified.

58. Plaintiff's termination was accompanied by public dissemination of the reason for his dismissal, i.e., contact with the criminal justice system, this reason stigmatizes Plaintiff's reputation as a free and equal citizen of the United States and forecloses prospective advantages, including, future and continuing employment opportunities without due process of law.

59. Plaintiff was given no notice of his wrongful termination, no opportunity to be heard or to be cleared of the false charge which was wrongfully used to terminate his employment and to have him falsely arrested. Plaintiff was denied the right to be heard before he was terminated.

60. Plaintiff was wrongfully deprived of his constitutional right to be a presumption innocent after his encounter with the criminal justice system.

61. Fundamental fairness and due process required that Plaintiff be provided a hearing at which he would have had the opportunity to challenge the truthfulness of the ground which were were proffered for his separation from his long term employment with WMATA.

COUNT IX
(42 U.S.C. 1983)

62. Plaintiff realleges and incorporates the allegations set forth in paragraphs 1 to 61 above as if fully set forth herein.

63. The acts described in paragraphs 1 to 61 above constitute malicious, arbitrary and capricious action by Defendants against Plaintiff in violation of the First and Fifth Amendments to the Constitution of the United States.

64. The actions of Defendants WMATA, Taylor and Williams resulted from and were taken pursuant to a de facto policy of WMATA, and implemented by officials and employees of WMATA such as Defendants, to deny African-American males in the District of Columbia an equal opportunity to remain gainfully employed when they have asserted a right to worker's compensation benefits or have had an encounter with the criminal justice system.

65. The aforesaid de facto policy of discriminating against African-American males such as Plaintiff is further implemented by Defendants by summarily punishing persons such as Plaintiff with immediate termination of this employment without due process of law.

66. The existence of the aforesaid de facto policy of discriminating against African-American males such as Plaintiff has been known to supervisory and final policy making officials of WMATA for a substantial period of time.

67. Despite Defendants' knowledge of the aforesaid de facto policy, Defendants have failed to accord African-American males such as Plaintiff, who have had an encounter with the criminal justice system, an equal opportunity to maintain gainful employment.

68. Defendants, including WMATA, have caused Plaintiff's statutory and constitutional rights to be intentionally violated.

69. As a result of the acts described herein, Plaintiff has suffered severe anxiety, emotional distress and has been wrongfully deprived of his employment.

70. All of Defendants' actions described above in depriving Plaintiff of his employment have been taken under color of law and in violation of Plaintiff's statutory and constitutional rights.

71. Defendant WMATA has entered into an agreement with Local 689 whereby African-American males such as Plaintiff can be wrongfully deprived of their employment under color of law.

72. Defendant WMATA has intentionally and willfully misplaced Plaintiff's official personnel files in further implementation of its de facto policy of depriving African-American males such as Plaintiff of gainful employment.

73. Defendant WMATA while acting under color of law have failed to explain to Plaintiff how his official personnel files were misplaced.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for the Court to:

74. Enter a declaratory judgment that the acts and practices of Defendants complained of herein are in violation of the public policies and the laws of the District of Columbia and the United States of America.

75. Grant Plaintiff a permanent injunction restraining the Defendants, their agents, assistants, successors, employees, attorneys, assigns and all those acting in concert or cooperation with them or their direction from further engaging in the acts and practices which

discriminate against Plaintiff because of his race and protected activities.

76. Issue an order requiring immediate installation of Plaintiff to the position to which he is qualified and occupied or would have applied and occupied with all rights and privileges due to him, including damages (compensatory and punitive damages), back pay, promotions and other employment benefits which Plaintiff would have received but for the unlawful conduct of the Defendants; and

77. Grant Plaintiff the costs of this action, including reasonable attorney's fees and expenses; and

78. Grant Plaintiff an amount in compensatory damages to be proved at trial; and

79. Grant Plaintiff punitive damages against Defendants' jointly and severally, in the amount of One Million ($1,000,000.00) Dollars; and

80. Issue an order to enforce the October 12, 1989 Order of Expungement from the Superior by requiring Defendants to expunge Plaintiff's encounter with the criminal justice system from their records and to reinstate Plaintiff to his employment with WMATA; and

81. Grant Plaintiff such other and further relief that this Court may deem just and proper.

Respectfully submitted,

Robert L. Bell, #954156
617 K Street, N.W.
Washington, D.C. 20001
(202) 842-4066

Attorney for Plaintiff,
PLATO L. SMITH

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues herein.

Robert L. Bell